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November 20, 2000

Harry M. Schueller, Chief
Division of Water Rights
State Water Resources Control Board
Post Office Box 2000
Sacramento, California 95812-0200

*Via facsimile (916) 341-5400
and mail*

Re: Suggested Topics for SWRCB Workshop Regarding Improving the Water Right
Process and Procedures (November 27, 2000)

Dear Mr. Schueller:

We would respectfully suggest that it may be worthwhile to consider the following
subjects in the workshop.

- A. We find increasing evidence that environmental interests and the Department of Fish and Game are using the SWRCB Complaint and Investigation Process to frustrate small diverters from their use of pre-1914 and riparian water. The threat of the technical complexity of water rights and the expense of proposed CEQA proceedings before the SWRCB are then used to effectively deprive the user of the use of water instead of developing methods of use that address the problem.

Examples: Typically, this occurs in Northern California when DFG demands a section 1603 permit from a pre-1914 or riparian user or threatens criminal prosecution by the local District Attorney and the new environmental attorney "circuit rider" positions. DFG, or the environmental interest, then contend that there is some technical use under the pre-1914 or riparian claim of right that requires a post-1914 appropriative filing, and, sometimes without a formal written complaint, a SWRCB field person contacts the landowner. Often this relates to a claim of storage beyond the regulatory period or a claim of expansion of the place of use or use outside the watershed since 1914.

To the small water user, the “piling on” is daunting. Often, DFG never informs the user of his or her right to obtain arbitration under Fish and Game Code §1603 if there is a disagreement in regard to the method of diversion. There is no arbitration procedure used in §5937 assertions. As you know, it is unclear whether §1603, which was first adopted in the 1960's, can even apply to practices and uses routinely undertaken by diverters prior to that time (such as placing rocks to create head for water diversion or pumping), so as to render those practices a crime. The water right holder is whipsawed and the SWRCB becomes the enemy. The small water user is threatened with years for processing an application, EIR's and fishery studies which are to be paid for by the water user. The result is that ordinary water use is stopped until the application is obtained. This causes the small irrigator to give up his right to use water because the legal fees and bureaucratic processes of the SWRCB appear overwhelming. Often, meetings will be held in the field in which the farmer is surrounded by wardens with guns on their hips, several representatives of the SWRCB; and all that is presented is problems, not solutions.

Solution: There appears to be a lack of constructive interaction between the Department of Fish and Game and the SWRCB to implement measures that will solve problems. Certainly, there are better technological means to divert water out of streams in some places than the methods used in the 1880's. Why doesn't the SWRCB Board meet with the Fish and Game Commission and demand that a handbook be prepared that can be given to these users. Such a handbook, based on sound science, could suggest fish-friendly ways to improve diversions in typical situations. Too often, wardens and DFG biologists respond to these situations by trying to get the water for the fish. The good faith assertions by SWRCB staff of water law technicalities are not used for the purpose they are designed . . . to protect downstream users and beneficial uses.

The real fact is that Fish & Game Code Sections 1601-1603 and the SWRCB's technical requirements are together being intentionally used to whipsaw landowners to stop often valuable and environmentally beneficial uses of water on small farming operations. Making a riparian or pre-1914 user obtain a post-1914 water right because he or she may put water in a reservoir in March and not remove it within 30 days or because he or she can't show that an area outside the watershed was irrigated pasture prior to 1914 is silly when there is no competing consumptive right being harmed, and the real question is the amounts of water to be bypassed and the structure of the diversion. A \$500/day fine is not good policy in these circumstances where the real issue is fishery needs.

What if:

1. The SWRCB demanded that DFG stop dragging its feet in regard to the arbitration process that is already available in Sections 1601 and 1603, and that on a trial basis, a panel of eligible impartial arbitrators be established in each Superior Court in the Northern counties. The Judges can create the list of candidates. The wardens would be instructed to give the list and an explanation of the process to Section 1601-1603 candidates. This avoids the present circumstance where a water user, if they even learn about their right to arbitration, is also told that DFG often fights even the appointment of an arbitrator; and that maneuver alone can easily add \$5,000 to the arbitration costs.

2. Why doesn't the SWRCB demand that more environmentally friendly methods of diverting water be outlined in a handbook jointly prepared by DFG and the SWRCB? These can include spillway designs, buried perforated pipes so that no dams need be constructed, and instructions or information regarding operating periods when flows are particularly critical for fish movement. As it is now, many landowners are told that if they apply for section 1603 authority, the warden or biologist will not vary the requirements during the year. Often, a diverter can forego some water diversions for a period if there is an understanding of the importance of that period to fish resources and corresponding increased diversions can be scheduled before and after the period of fishery interest.

3. Arbitration will often resolve many of the water use issues of flow, diversions, and the like. So, why does the SWRCB need to insist upon a post-1914 water right filing when there is no competing consumptive use if the landowner and warden, with the help of an arbitrator, can fashion the operating conditions in a manner that protects the environmental uses? The SWRCB staff needs to be reminded that not everything in the world of water needs to be on a piece of paper called an appropriative right. We have seen \$500/day fine-threat letters sent to small users who can only interpret this as environmental activism on the part of the SWRCB, when, in fact, it is only that well-meaning SWRCB personnel have a penchant for paperwork.

B. The SWRCB and other Boards within the State seem to depend too much on staff communication and coordination, and the Board's policy and leadership role is severely neglected.

1. The Energy Commission is approving sites for thermal power generation. One way to dispose of salts that affect San Joaquin River water quality is to transport the salts for disposal rather than discharge them to the San Joaquin River. Some thermal power sites are better than others from a water resources standpoint, but no one ever seems to balance these issues with power transmission line or fuel line constraints. Why isn't the SWRCB convening a joint hearing of the full Boards of the Energy Commission and SWRCB to receive evidence in regard to the economic and physical feasibility factors affecting site decision? The United States Bureau of Reclamation, which has substantial responsibility for the salinity problems of the San Joaquin River, and the California Energy Commission and FERC, never discuss and coordinate. In short, why isn't the SWRCB more of a policy-directing and guiding body on these type of issues, or at least serving the role of assuring that infeasible alternatives and detrimental impacts from alternatives are identified? Commenting on CEQA or functional equivalent documents is not working.

2. Why isn't the SWRCB's policymaking function given a greater emphasis in agricultural issues? There is substantial evidence of declining irrigable land in California and worldwide. There is substantial evidence that permanent plantings, in some areas of the San Joaquin Valley where groundwater resources are unreliable, should be accompanied by some type of "drought year planning mechanism" rather than the old saw that farmers pick their crop and take their chances. There is substantial evidence that salinization of productive farm land is increasing world wide and that the political devices of studies (which we are all too familiar with

take their chances. There is substantial evidence that salinization of productive farm land is increasing world wide and that the political devices of studies (which we are all too familiar with in California) will not answer the need for the food. If the SWRCB does not hold hearings and utilize its water right powers to attempt to determine proper or alternative societal directions, which determine how water will be utilized, who will? If we are going to cripple California agriculture during a drought by water unavailability because of population growth, what countries will supply the tomatoes, corn, milk, rice and cotton, and what arrangements will the U. S. Department of Agriculture make to assure those supplies? If the SWRCB is waiting for the U. S. government or other state organizations, it should be obvious by now that leadership, or even establishing a dialogue about the potential leadership directions and mechanisms, is not emanating from these sources.

3. There is a current thought that more water can be made available for urban population needs if we simply raise the price of water to agriculture. One such federal water service pricing measure – tiered pricing – is plainly punitive. Our faith in economic stimulus apparently is to be the solution to the problem of adding 10 million people without adding any significant new water resources. It would seem that someone would want to ask the question, and obtain the answer, as to how the genius of economic stimulus is going to produce substitute food sources when our failure to properly plan for droughts and deal with increased water costs drive production down and agriculture out of California.

Very truly yours,

MINASIAN, SPRUANCE, BABER,
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By:



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